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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ....., ORIGINAL.

STATE OF LOUISIANA,
Plaintiff,

against

CLAUDE CUMMINS, CLARENCE R. BIRCH, DREDGING REALIZATION CORPORATION, STANDARD DREDGING CORPORATION and ABRAHAM L. SHUSHAN,
Defendants.

OPPOSITION TO THE MOTION OF THE STATE OF LOUISIANA FOR LEAVE TO FILE COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now Claude Cummins, Clarence R. Birch, Dredging Realization Corporation, a corporation of New Jersey, and Standard Dredging Corporation, a corporation of New Jersey, sought to be made defendants in the above entitled cause, and in response to the rule to show cause issued herein on June 9, 1941, oppose the motion of the State of Louisiana for leave to file its complaint in this Court on the following grounds:

1. The Court would be without original jurisdiction because the cause of action, if any, asserted in the proposed complaint is vested in the Board of Levee Commissioners

of the Orleans Levee District, which is a political corporation and a legal entity entirely distinct from the state.

2. The Court would be without jurisdiction because the matters set forth in the proposed complaint involve a controversy with defendant Shushan who is a citizen of the State of Louisiana. There is therefore no diversity of citizenship to support federal jurisdiction, and, since Shushan's rights are involved, the difficulty cannot be cured by dismissing as to him and proceeding in his absence.

3. The Court should in any event decline to take jurisdiction of the proposed case because it is brought by a state against citizens of other states simply for a money judgment, and there is no showing of the want of another forum.

WHEREFORE, with full reservation of all motions, pleas and defenses to the proposed complaint, the defendants respectfully pray that this Court deny the motion of the State of Louisiana for leave to file its proposed complaint herein.

September 29, 1941.

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and

EBERHARD P. DEUTSCH,
Hibernia Bank Bldg., New Orleans, La.
Attorneys and counsel for defendants Cummins, Birch, Dredging Realization Corporation and Standard Dredging Corporation.

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Defendants.

BRIEF IN OPPOSITION TO THE MOTION OF THE STATE OF LOUISIANA FOR LEAVE TO FILE COMPLAINT.

Statement.

The State of Louisiana has annexed to its motion papers its proposed complaint. In this it is alleged that on March 6, 1931, a contract for filling marsh land to make an airport was entered into between the Board of Levee Commissioners of the Orleans Levee District (hereinafter called the Levee Board) acting through its president, Abraham L. Shushan, and the Orleans Dredging Company, Inc., and that this contract was performed by the dredging company's making a fill of approximately 6,479,780 cubic yards of earth, for which it was paid at the stipulated price

of 13.9 cents per cubic yard. It is further alleged that for the purpose of inducing his favorable action on said contract defendant Shushan was bribed in an amount upwards of $130,000 by representatives of the dredging company. Because of this the complaint seeks to recover back all or some part of the compensation paid to the dredging company under the contract, as well as the alleged bribe.

The defendants against whom redress is sought are, besides Shushan, Standard Dredging Corporation, which is alleged to have been the parent company of Orleans Dredging Company, Inc., Dredging Realization Corporation, which is alleged to have taken over the assets of Orleans Dredging Company, Inc., when the latter was dissolved some time ago, and two individuals, Cummins and Birch, who are alleged to have been officers of Orleans Dredging Company, Inc., and its parent at the time of the matters complained of.

The two corporate defendants are alleged to be New Jersey corporations with their principal places of business located in the City of New York. Cummins is alleged to be a citizen of California resident in the City of New York, and Birch is alleged to be a citizen of New York resident in New York. Defendant Shushan is alleged to be a resident and citizen of Louisiana. There is, therefore, a lack of diversity of citizenship between plaintiff and defendant Shushan.

POINT ONE.

THE CAUSE OF ACTION, IF ANY, ALLEGED IN THE PROPOSED COMPLAINT IS VESTED IN THE LEVEE BOARD, AND NOT THE STATE OF LOUISIANA, AND THE CASE, THEREFORE, IS NOT WITHIN THE ORIGINAL JURISDICTION OF THIS COURT.

The contract for the airport fill which forms the subject matter of the proposed complaint was entered into on March 6, 1931, between The Board of Levee Commissioners of the Orleans Levee District (hereinafter called the Levee Board), party of the one part, and Orleans Dredging Company, Inc., party of the other part. This Levee Board, as the proposed complaint alleges in Article IV, was created pursuant to Louisiana Act 93 of 1890. Section 3 of that act, which remains unrepealed and unamended to date, reads as follows:

> "That said commissioners shall constitute and be styled 'The Board of Levee Commissioners of the Orleans Levee District', and as such are hereby constituted and created a body politic, with needful succession and corporate powers; shall have power to sue and be sued in their corporate name; shall have a common seal, and shall have the franchise and power to do and perform all the purposes of this act; and to acquire, hold, own and convey all the property, real and personal, needful in the premises, and to alienate, mortgage and pledge the same for said purposes.
>
> "The domicile of this Board shall be in the City of New Orleans, where it shall be suable; and service of citation shall in all cases be made upon its President."

The particular authorization for the airport construction in question is, as alleged in Article VI of the proposed

complaint, found in an amendment to the Louisiana Constitution adopted November 4, 1930 (Art. 16; Sec. 7b—the proposed complaint says Sec. 76, but this is apparently a misprint for Sec. 7b).

At the same time, the Constitution was amended by adding to Article 16 a Section 7a which provides that:

> "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred upon said Board by law, as well as such powers as are herein granted."

Thus by constitutional sanction the powers of the Levee Board were put beyond the authority of the legislature to alter or repeal.

In this situation it is the firmly settled law of Louisiana that the Levee Board, though an agency of the state, is a legal entity wholly apart from the state, and that consequently a cause of action arising from board affairs rests with the board, and cannot be sued upon by the state. *State* v. *Tensas Delta Land Co.*, 126 La. 59; 52 So. 216 (1910); *State* v. *Standard Oil Co.*, 164 La. 334; 113 So. 867 (1927). In the former case the court said on page 72 (126 La.):

> "The argument that the said board is nothing more than a mere agency or instrumentality of the state, and that therefore the state may sue in every case where the said board might sue, contains a manifest non sequitur. Every city, town, and parish of the state is a mere agency or instrumentality of the state; but no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the state, any cause of action which any of them might have."

and in the latter case on page 357 (164 La.):

> "The board is a state agency, of course, just as any other subdivision incorporated by an act of the Legislature is a state agency; but the board has the right to sue and be sued, and it alone must assert its rights of action. The Attorney General has no right to sue for and in the name of the state on a cause or right of action possessed only by the levee board."

In *Board* v. *Hardtner,* 164 La. 632; 114 So. 494 (1927) the point was pushed a little further and it was held that a levee board could bring a suit against state officers and set aside a sale of the board's property that these officers had purported to make in behalf of the state, and in *Saint* v. *Allen,* 172 La. 350; 134 So. 246 (1931) it was held that the Louisiana Highway Commission, which, like the levee boards, was a political corporation, was empowered to employ its own legal staff free from control of the Attorney General. In this latter case the court said (172 La. 360):

> "The commission, in our opinion, is a distinct legal entity from the state. Section 3 of Act 95 of 1921 (Ex. Sess.) makes it a body corporate, with power as such to sue and be sued. It is an agency of the state, and not the state itself, created for the purpose of executing certain duties, devolving primarily upon the state. In a general sense, in its relations to the state, it is not dissimilar to levee districts, which are bodies corporate, created for the purpose of constructing and maintaining levees, which are duties devolving primarily upon the state. It was held in *State* v. *Standard Oil Co.,* 164 La. 334, 357, 113 So. 867, and in *State* v. *Tensas Delta Land Co.,* 126 La. 59, 52 So. 216, that a levee district, though the creature and agency of the state, had, as long as it was permitted to exist, a separate existence from the state, and that the state could not sue on causes of action accruing to the district."

Louisiana v. *Jack*, 244 U. S. 397 (1917), arose as a sequel to the *Tensas* case and in its decision this Court recognized and gave full faith to the rule above announced.

There cannot, therefore, be the slightest doubt that the cause of action, if any, set forth in the proposed complaint is vested in the Levee Board and not in the State of Louisiana.

But, the proposed complaint alleges, the state is proceeding through its newly formed State Crime Commission under authority of Louisiana Act 13 of 1940.

Section 3b of Act 13 of 1940 does, as the state's brief points out, authorize representatives of the Crime Commission to bring civil proceedings in the name of the State of Louisiana for recovery of any moneys, etc. that may have been diverted from the state, and it is true, as the state's brief says, that Section 2 of the act defines the word "State" as including all public boards and commissions. What the state's brief fails to point out, however, is that this authority to bring suits is limited to suits at Baton Rouge or at the domicile of the defendants. The second paragraph of Section 3b reads as follows:

> "That any suit filed under the provisions of this Act may be instituted in the Nineteenth Judicial District, Parish of East Baton Rouge, Baton Rouge, Louisiana, or at the domicile of the defendant, or any one of the defendants named in such suit, at the discretion of the Commission, and shall be tried by preference and before any and all other civil proceedings. The Commission is empowered, whenever it believes such course necessary or desirable, to commence any such civil proceedings by attachment of any property of the defendant or defendants, without the necessity of posting bond."

A suit in the Supreme Court of the United States is clearly not authorized by Act 13 of 1940.

Notwithstanding this, we move to broader ground. For purposes of argument we may assume that either through Act 13 of 1940 or some other legislation the State of Louisiana has been authorized to sue on the Levee Board's cause of action.

Having regard to the constitutional amendment above referred to, the effect of this would not and could not be to shear the Levee Board of its powers or to divest it of its cause of action. The state would merely be constituted as collecting or enforcing agent, and the Levee Board would necessarily remain as owner of the cause of action.

In *Louisiana* v. *Jack, supra,* the Louisiana legislature, in an effort to circumvent the holding of the *Tensas* case, passed a statute by which it was "hereby made the duty of the Attorney General of the State, upon the request of the Governor to represent the State or any political agency or subdivision thereof, in any suit in any court involving title to any land or real property belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the State or in the name of any of its political agencies or subdivisions". This Court held that notwithstanding this statute, the levee board still owned the cause of action, and could compromise it.

In *People* v. *Wood,* 121 N. Y. 522, 530 (1890), a similar statute of New York was involved, and it was held that the state sued merely as agent or representative of the defrauded political subdivision, and that the case would be determined by the same principles as though the political subdivision had brought it directly.

Even if we assume, therefore, that the State of Louisiana is rightfully here, nevertheless, it can only sue as the rep-

resentative or agent of the Levee Board, and the Supreme Court will have no original jurisdiction.

Were this not so, the original jurisdiction of the Supreme Court could be invoked simply by the expedient of having a state legislature pass a law appointing the state trustee or agent for purpose of bringing suit, and thus the original jurisdiction of the Court would be made to depend on the will of state legislatures. Certainly this was never intended.

In *Oklahoma* v. *Cook,* 304 U. S. 387 (1938), Oklahoma on relation of its Bank Commissioner asked leave to bring a suit in this Court's original jurisdiction to enforce stockholders' liability to an insolvent state bank. In the Oklahoma Banking Law it was provided that the Bank Commissioner was authorized "to prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him" and that such suits were to be brought "in the name of the State of Oklahoma, on the relation of the Bank Commissioner". This Court held that it would have no jurisdiction saying that to bring a case within the original jurisdiction it was not enough that a state was plaintiff or that it had acquired legal title to the cause of action if the beneficial interest was elsewhere.

In *New Hampshire* v. *Louisiana,* 108 U. S. 76 (1882), original jurisdiction was refused of a suit sought to be brought by the State of New Hampshire to collect on bonds of Louisiana which had been assigned to the state pursuant to a statute which provided that citizens of New Hampshire might assign their bonds to the state for purposes of bringing suit. The decision was based on the ground that the state would be acting for others in prosecuting the case.

In *Kansas* v. *U. S.,* 204 U. S. 331 (1907), it was held that Kansas could not invoke the original jurisdiction of

the Supreme Court where the action was brought for the benefit of a railroad.

In *Oklahoma* v. *A. T. & Santa Fe Ry.*, 220 U. S. 277 (1911), the state sought to enjoin the enforcement of certain railroad rates by the defendant. Jurisdiction was denied on the ground that the state had no property interest in the litigation as a corporate body itself, and no standing to represent such of its citizens as might be shippers.

In *Missouri* v. *Illinois*, 180 U. S. 208 (1901), the Supreme Court took original jurisdiction of an action to restrain the commission of a nuisance which would have threatened several large municipalities of the plaintiff state. The Court emphasized, however, that more was at stake than the mere welfare of one or two communities saying (p. 241):

> "The health and comfort of the large communities inhabiting those parts of the State on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves through the territory of the State."

In *Louisiana* v. *Texas*, 176 U. S. 1 (1900), original jurisdiction was refused of a suit to restrain the enforcement of Texas quarantine regulations to the alleged damage of citizens of Louisiana. In a concurring opinion, Brown, J., said on page 28:

> "* * * The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant."

In its brief attached to the motion papers, the plaintiff makes no effort to avoid the rule of the decisions just quoted other than to cite *State* v. *Walmsley*, 181 La. 597; 160 So. 91 (1935), which is a Louisiana case that has no bearing on

the question of the Supreme Court's original jurisdiction, and to reiterate the statement that the fisc of Louisiana has been damaged.

If by saying that the fisc has been damaged the plaintiff means that the State Treasury has been damaged, the statement cannot be accepted, because it is abundantly clear from Article 16, Section 7, of the Louisiana Constitution, pursuant to which the airport was constructed, that the Levee Board's funds were entirely separate from the state's funds. If, however, all that is meant is that the state as *parens patriae* is damaged whenever its citizens or agencies are damaged, then the statement is unexceptionable enough, but it is quite insufficient to show the state's interest as party plaintiff.

The Orleans Levee Board is only one out of some 22 levee boards in the state. It is only one out of countless political corporations in the state. Should the Court entertain this suit, brought by the state for the benefit of its minor agency, the Court would, by the precedent so established, have to entertain suits arising out of the activities of any city, village, levee board or what not that the state should choose to sue for.

POINT TWO.

THE PRESENCE OF SHUSHAN, A CITIZEN OF LOUISIANA, AS DEFENDANT PREVENTS THE COURT FROM HAVING JURISDICTION, BUT, SINCE SHUSHAN'S RIGHTS ARE INVOLVED IN THE CONTROVERSY, THE DIFFICULTY CANNOT BE CURED BY DROPPING HIM AS DEFENDANT AND PROCEEDING IN HIS ABSENCE.

The controversy as alleged in the proposed complaint involves the defendants here appearing, citizens of states other than Louisiana, who are alleged to have paid the

bribe and enjoyed its fruits, the defendant Shushan, a citizen of Louisiana, who is alleged to have received the bribe, and the State of Louisiana as plaintiff, which, we assume for purposes of this argument, is alleged to have been damaged.

The presence of Shushan as defendant prevents a complete diversity of citizenship and the result is that the Supreme Court would not have jurisdiction. This is the rule of an unbroken line of authorities. *Pennsylvania* v. *Quicksilver Co.*, 10 Wall. 553 (1871); *California* v. *Southern Pacific Co.*, 157 U. S. 229 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199 (1902); *New Mexico* v. *Lane*, 243 U. S. 52 (1917); *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158 (1922); and others.

The attempt of the state to invoke the doctrine of separable controversy so as to avoid the effect of this rule is ingenious, but it hardly needs answering.

A *defendant* may, if there be a separable controversy involving him in which the diversity of citizenship is complete, remove the case to a federal court notwithstanding that there are other controversies where the diversity is not complete. This is for the obvious reason that a plaintiff should not be able to deprive a defendant of his resort to the federal court by the mere device of joining something else onto the complaint.

But to turn the thing around so that the effect of it would be to allow a *plaintiff* to bring a suit in the federal jurisdiction when there is not diversity of citizenship, by the expedient of merely joining some other separable controversy onto the complaint, would be to open the federal courts to every kind of case that any ingenious pleader wished to bring. One will search *Ohio* v. *Helvering*, 292 U. S. 360 (1934), and indeed all other authority, in vain for support of any such astonishing proposal.

However, on page 5 of its brief the state invites the Court to strike Shushan as defendant, and then entertain the suit.

This is exactly the situation that arose in *California* v. *Southern Pacific Co., supra.* There the state brought a bill in equity against the railroad to clear title and recover possession of certain water front property that the railroad occupied. In the course of the trial it became apparent that the City of Oakland, and the Oakland Water Front Company, both California corporations, were interested in the controversy since it was through a grant from the state to these corporations that the railroad claimed its rights, and the validity of that grant was, therefore, in issue. This Court held that by reason of the finality of its own decisions it was not appropriate that it should exercise its original jurisdiction where the rights of absent parties were involved, even though the absent ones were not indispensable parties to the case and even though they would not be bound by the decision. On page 257 (157 U. S.) the Court says:

> "We have no hesitation in holding that when an original cause is pending in this court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

Since the joinder of Oakland and the water front company would have divested the court of jurisdiction under the rule mentioned above, the case was dismissed.

Apparently realizing that *California* v. *Southern Pacific Co.* is an insurmountable obstacle, the state in its brief rests

heavily on the dissenting opinion in that case. This, we suppose, is tantamount to a request that the holding be overruled.

It is true that *California* v. *Southern Pacific Co.* was a hard case, and there is force in what the dissenting judge wrote. But the primary question involved, there as here, was a question of the state's domestic political conduct, and to permit the state, by the device of involving outsiders, to resort to the Supreme Court for the purpose of resolving disputes among its own political subdivisions and their officers, and in their absence too, would surely be as unwise as it would be fraught with trouble.

We respectfully submit that the trial under the exceptional jurisdiction of the Supreme Court of an issue of bribery between a state and its own public servant, and in the absence of the public servant too, would neither "comport with the gravity and finality which should characterize such an adjudication", nor would it comport with the dignity of the Court.

POINT THREE.

THE COURT SHOULD DECLINE JURISDICTION OF THE PROPOSED ACTION UNDER THE RULE OF *Massachusetts* v. *Missouri*, SINCE IT IS BROUGHT BY A STATE AGAINST CITIZENS OF OTHER STATES SIMPLY FOR A MONEY JUDGMENT, AND THERE IS NO SHOWING OF THE WANT OF ANOTHER FORUM.

The complaint which the State of Louisiana proposes to file in this proceeding is characterized by the state as one in equity, on a cause of action for which the plaintiff alleges it has no adequate remedy at law. In truth and in fact, however, the essence of the alleged cause of action is simply a declaration for money had and received, and the ultimate

relief for which the state prays is merely a judgment for money.

The alleged multiplicity of suits to be avoided arises on the suggestion of the state that unless the jurisdiction of the Supreme Court is invoked, it will have to sue the defendant Shushan in Louisiana and the other defendants elsewhere. As it is alleged, however, that all the other defendants are present in New York, only one other suit would be necessary, and certainly two suits are not such a multiplicity as to justify a bill in equity. *Empire Engineering Corp.* v. *Mack,* 217 N. Y. 85 (1916); *Kohlhamer* v. *Smietanka,* 239 Fed. 408 (1917).

In 1886 this Court held in *Buzard* v. *Houston,* 119 U. S. 347, that a bill praying for discovery and for rescission and cancellation of a contract on the ground of fraud, coupled with a money demand and various alternative and additional claims, was nevertheless an action at law triable by jury and not maintainable as a suit in equity, since "a judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled" (p. 353).

More recently in *U. S.* v. *Bitter Root Development Co.,* 200 U. S. 451 (1906), this Court held that neither a demand for an accounting, the necessity of discovery, nor even an alleged multiplicity of suits would support a bill in equity when the relief sought was merely a judgment for money. The equitable remedies prayed for, said this Court, could all be made available incidentally in an action at law; and as to the alleged multiplicity of suits: "Those persons who were guilty of the wrong must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other" (p. 479).

In *Curriden* v. *Middleton,* 232 U. S. 633 (1914), it was held that an action for damages arising out of a conspiracy

to defraud is justiciable at law and not in equity, even though the prayer for relief seeks discovery.

It is clear, therefore, that the proposed action is simply one at law, seeking recovery of money, and that the defendants are entitled to a jury trial even if the case be proceeded with in the Supreme Court. 28 U. S. C. 343.

In this exact situation, i. e., where a state seeks to bring an action at law against citizens of other states, the Court has ruled that it will not take original jurisdiction in the absence of special facts to show the want of another forum. *Massachusetts* v. *Missouri*, 308 U. S. 1 (1939) where it was said (p. 18):

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction in an action by a State merely to recover money alleged to be due from citizens of other States is necessary for the State's protection. In *Oklahoma* v. *Cook, supra,* we called attention to the enormous burden which would be imposed upon this Court if by taking title to assets of insolvent state institutions, including claims against citizens of other States, a State could demand access to the original jurisdiction of this Court to enforce such claims. To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it. We have observed that the broad statement that a court having jurisdiction must exercise it (see

> *Cohens* v. *Virginia,* 6 Wheat. 264, 404) is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. *Canada Malting Co.* v. *Paterson Co.,* 285 U. S. 413, 422; *Rogers* v. *Guaranty Trust Co.,* 288 U. S. 123, 130, 131. Grounds for justifying such a qualification have been found in 'considerations of convenience, efficiency and justice' applicable to particular classes of cases. *Rogers* v. *Guaranty Trust Co., supra.* Reasons not less cogent point to the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States."

In the instant case there is no showing whatever of lack of an adequate forum. On the contrary, the State of Louisiana can certainly pursue Shushan in its own courts, and as to the other defendants it can come to New York. *Delafield* v. *Illinois,* 2 Hill. 159, and 26 Wend. 192 (1841). There is not the slightest need to invoke the exceptional jurisdiction of the Supreme Court of the United States.

September 29, 1941

Respectfully submitted,

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